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No. 94-197

In the

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, individually and in her official capacity as Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; THOMAS HAYES, Director, California Department of Finance,

Petitioners,

v.

DESHAWN GREEN; DEBBY VENTURELLA; and DIANA P. BERTOLLT, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF AMICUS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners Eloise Anderson, *et al.* Written consent to the filing of this brief has been granted by

counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the welfare reform arena will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous other cases before this Court including welfare reform cases such as *Lascaris v. Shirley*, 420 U.S. 730 (1975), and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

PLF believes that temporary, nondrastic restrictions on welfare benefits distributed to residents within their first year of arrival in a state do not violate the constitutional right to travel. The absolutist equal protection analysis of *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), need not, and should not, control the outcome of this litigation. This Court's decisions have followed a trend away from the analysis in those two cases, and, in fact, that analysis has been unable to command a majority of this Court since 1974, a scant five years after it was introduced. PLF argues that this Court should substantially narrow or overrule the *Shapiro* and *Memorial Hospital* rulings regarding durational

residency requirements and the right to travel. In their place, this Court should provide an analysis that balances the interests of the immigrants against the interests of the state. Under this analysis, this Court should rule that reasonable restrictions on the receipt of public assistance benefits are fully constitutional.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994). The order of the trial court granting the respondents' motion for preliminary injunction and referenced by the Ninth Circuit opinion is reported at 811 F. Supp. 516 (E.D. Cal. 1993).

SUMMARY OF ARGUMENT

The absolutist analysis of *Shapiro v. Thompson*, 394 U.S. 618, has been substantially diminished over time. This Court has applied a handful of different analyses to right to travel issues, thus undermining the controlling precedential effect of any one form of analysis. *Shapiro* was based on a strict scrutiny equal protection analysis. *Memorial Hospital* emphasized the concept of a "penalty" in the strict scrutiny analysis. *Sosna v. Iowa*, 419 U.S. 393 (1975), applied an ad hoc balancing test. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Zobel v. Williams*, 457 U.S. 55 (1982), were decided under a rational basis review, without addressing the proper standard of review. Justice O'Connor has twice advocated a two-pronged test based on the Privileges and Immunities Clause of Article IV of the Constitution. *Zobel*, 457 U.S. at 71-81 (O'Connor, J., concurring in the judgment); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (O'Connor, J., dissenting). Meanwhile, other disparities in welfare

payments were upheld against equal protection challenges. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

The court below specifically relied on *Shapiro* and *Memorial Hospital* for its decision. *Shapiro* and *Memorial Hospital* represent an aberration in the right to travel analysis, when compared both to those cases which came before, *e.g.*, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), and those which came later. Before *Shapiro*, 46 states and Washington, D.C., had laws requiring new residents to wait a certain period before receiving welfare. *Shapiro*, 394 U.S. at 624 n.3. Now, several states have implemented reduced (but not eliminated) public assistance payments to new immigrants. *Green v. Anderson*, 811 F. Supp. 516, 523 (E.D. Cal. 1993) (listing California, New York, Wisconsin, and Minnesota). Given the temporary and nondrastic reduction of welfare benefits at issue in this case, Cal. Welf. & Inst. Code § 11450.03,[1] the state's necessity of a balanced budget to promote employment, and the ability to provide some amount of

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[1] California Welfare and Institutions Code § 11450.03 provides in pertinent part:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

public assistance to *all* California residents no matter when their entry into the state, the statute should easily survive a constitutional challenge.

ARGUMENT

I

SHAPIRO AND ITS PROGENY DO NOT PROVIDE A DETERMINATE MEANS OF ANALYSIS

Shapiro v. Thompson is the hook on which the court below hung its hat. *Green*, 811 F. Supp. at 519, 523. *Shapiro* invalidated a one year residency requirement imposed before *any* welfare benefits could be collected because the Court found no compelling state interest capable of justifying the requirement. *Shapiro*, 394 U.S. at 642. Among the state interests the Court found admittedly permissible but noncompelling were (1) discouraging the influx of poor families; (2) facilitating the planning of the welfare budget; (3) providing an objective test of residency; (4) minimizing the opportunity for recipients to receive payments fraudulently from more than one jurisdiction; and (5) encouraging early entry of new residents into the labor force. *Id.* at 631-32, 634. The Court held that constitutional concepts require that all citizens "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 629. This is undoubtedly true.

Yet, the Court did not analyze the statutes at issue in the light of an "unreasonable burden or restriction." Rather, it invoked the usually fatal strict scrutiny. The Court viewed a state's responsibility to maintain a healthy fiscal policy with an attitude approaching scorn. *Shapiro*, 394 U.S. at 633. Perhaps in 1969, the states simply did not face the fiscal

crises that are now so often commonplace, particularly in California. Declaration of Dennis Hordyk, Petition for Writ of Certiorari at A21 (Hordyk Decl.). Justice Harlan, in dissent, immediately foresaw the problems with this analysis and said that when a statute affects only matters not mentioned in the Constitution, and is not arbitrary or irrational, the court is not entitled to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test. *Shapiro*, 394 U.S. at 662 (Harlan, J., dissenting). Justice Harlan also recognized the long-range implications of the decision:

> [T]he field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments.

Id. at 674-75 (Harlan, J., dissenting). In California, the state government did expand its public assistance levels to extremely generous proportions when the state was experiencing a "boom" in population and economic growth. Declaration of John D. Healy, Petition for Writ of Certiorari at A23, ¶¶ 3-4 (Healy Decl.). With the inevitable recession that followed the expansion, California has sought to cut back its more profligate spending in ways to harm the fewest people as possible. *Id.* at A24, ¶¶ 7-8; Declaration of Michael C. Genest, Petition for Writ of Certiorari at A25-

A26, ¶¶ 4-6 (Genest Decl.). The court below refuses to permit California to control its own budget.

Dunn v. Blumstein, 405 U.S. 330 (1972), took the *Shapiro* analysis one step further. While noting the specific language in *Shapiro* that the decision did not purport to decide whether durational residence requirements could be used to determine voting eligibility (*Shapiro*, 394 U.S. at 638 n.21), the Court nevertheless found that a law requiring one year of state residence and three months of county residence before registering to vote *penalized* the right to travel by forcing a person who wishes to travel and change residences to choose between travel and the basic right to vote. *Dunn*, 405 U.S. at 342. *Dunn*, too, emphasized strict scrutiny as the measure of the constitutionality of the law. *Id.* at 343. Despite the Court's disclaimer that it was not "secretly requir[ing] the impossible,"[2] given the strict analysis, the unsurprising result was an invalidated statute. *Id.* at 360.

Memorial Hospital v. Maricopa County further expanded the *Shapiro* analysis. That case struck down a statute which prohibited residents of less than 12 months duration to receive publicly funded nonemergency medical care. *Memorial Hospital*, 415 U.S. at 254. The Court held that the statute penalized interstate travel because medical care is as much "'a basic necessity of life'" to an indigent as the welfare assistance in *Shapiro*. *Id.* at 259. The Court found that the right of interstate travel must be seen as insuring new residents the same right to vital government

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[2] In dissent, Chief Justice Burger refuted this statement, arguing that "no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." *Dunn*, 405 U.S. at 363-64 (Burger, C.J., dissenting).

benefits and privileges in the states to which they migrate as are enjoyed by other residents. *Id.* at 261. The Court applied strict scrutiny and struck down the statute. *Id.* at 269-70. One of the more bizarre threads that bind *Shapiro*, *Dunn*, and *Memorial Hospital* is the notion that no evidence need exist that any person was actually deterred from traveling by the challenged restrictions. *Shapiro*, 394 U.S. at 650 (Warren, C.J., dissenting); *Dunn*, 405 U.S. at 340; *Memorial Hospital*, 415 U.S. at 257-58. This admitted lack of deterrence should, at the very least, call into question whether the "right to travel" has been implicated at all. After all, if the whole point of the amorphous right to travel is to permit citizens of the United States to move freely throughout the country, the fact that the complainants in all of these cases *did*, in fact, move where they wanted to move, should have significant bearing on the analysis.

The *Shapiro* line of cases has been distinguished on a number of bases by this Court. As early as 1975, the Court had distinguished *Shapiro* and *Memorial Hospital* in a durational residency case. In *Sosna v. Iowa*, the Court upheld an Iowa statute which required one year of continuous residence in Iowa before a petition for divorce against a nonresident could be filed. *Sosna*, 419 U.S. at 395. The Court distinguished *Shapiro*, *Dunn*, and *Memorial Hospital* with the observation that "the durational residency requirements they struck down were justified on the basis of budgetary or recordkeeping considerations." *Sosna*, 419 U.S. at 406. Iowa's state interest was to ensure recognition of its divorce decrees by other states under the Full Faith and Credit Clause of the Constitution. This was considered a more potent state interest than fiscal matters. The Court upheld the statute without specifying a standard of review. The opinion balanced the state interest in favor of the statute against the burden on the right to travel, concluding that the former outweighed the latter. *Id.* at 406,

409-10. The Court emphasized that the gravamen of Sosna's claim was not a *total deprivation*, but only delay. *Id.* at 410. This same statement distinguishes the case at issue from *Shapiro*, *Memorial Hospital*, and *Dunn*. In each of the earlier cases, the claimant was *totally* cut-off from welfare benefits, nonemergency medical care, or voter registration. This statute at issue in this case, in contrast, only *partially* restricts welfare payments for a limited time.

Sosna threw considerable doubt on the viability of the *Shapiro* line of cases.[3] Justice Marshall, in dissent, said the majority opinion "departs sharply" from *Shapiro*, substituting an "*ad hoc* balancing test" for strict scrutiny. *Sosna*, 419 U.S. at 418-19 (Marshall, J., dissenting). *Joseph v. City of Birmingham*, 510 F. Supp. 1319, 1335 n.23 (E.D. Mich. 1981) (upholding one year residency requirement for candidates for municipal office) interpreted *Sosna* as foreshadowing possible abandonment of the penalty analysis. Moreover, *Joseph* favored the balancing test used in *Sosna*, noting the particular factors to take into account: (1) the importance of the benefit withheld from recently arrived residents (this includes both the severity of the effects on the lives of these recently arrived residents who are denied the benefit and the constitutional stature of the benefit itself); (2) the extent of the interference with interstate travel (*i.e.*, the actual likelihood of deterring such travel); (3) the legislative intent; and (4) the governmental interests fostered by the law. Under this type of analysis, the California statute passes constitutional muster. *Joseph*, 510 F. Supp. at 1335 n.23. These four factors were derived from Justice Harlan's dissent in *Shapiro* (*Shapiro*, 394 U.S. at 663, 671

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[3] *See also Vlandis v. Kline*, 412 U.S. 441, 452-54 (1973) (upholding waiting period for resident tuition at state universities).

(Harlan, J., dissenting)) which apparently formed the basis of the majority *Sosna* opinion. *Sosna*, 419 U.S. at 406-09 (majority); 419 (Marshall, J., dissenting).

Applying neither the *Shapiro* strict scrutiny analysis nor the *Sosna* balancing test, *Zobel v. Williams*, 457 U.S. 55, invalidated Alaska's oil reserve dividend giveaway in varying amounts based on the length of each citizens' residence (*id.* at 57, 65) under the rational basis test without reaching the question of whether the program penalized the exercise of the right to travel. *Zobel*, 457 U.S. at 60-61, 65. The Court found that rewarding citizens for past contributions was not a legitimate state purpose. *Id.* at 63. The Court distinguished the *Shapiro* line of cases because the Alaska statute did not impose any threshold waiting period before receiving benefits; rather, it created "fixed, *permanent* distinctions" between all residents of Alaska, depending on how long they have been in the state. *Id.* at 59 (emphasis added). *Zobel* is more notable for Justice O'Connor's concurrence using a very different analysis. Justice O'Connor suggests an approach based on the Privileges and Immunities Clause of Article IV of the Constitution. *Id.* at 74-78 (O'Connor, J., concurring). She argued that a statute must satisfy a two-part test if it burdens a nonresident or new resident who seeks to engage in an essential activity or exercise a basic right. *Id.* at 76. First, there must be something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed. *Id.* Second, the Court must find a substantial relationship between the evil and the discrimination practiced against the noncitizen. *Id.* Applying this test, Justice O'Connor found that even if new residents were a peculiar source of the "evil" of "partaking in current largesse without having made prior contributions," *id.* at 77, a contention Justice O'Connor found unpersuasive, the cure does not bear a substantial relationship to the malady because some people who migrated

to Alaska may have contributed significantly more to the state, both before and after their arrival, than have some natives. *Id.* at 78.

Even under this test, the California statute passes constitutional muster. First, it is California's population explosion, *i.e.*, new residents, combined with generous welfare benefits, that has stretched the public assistance budget to the breaking point. Second, the California statute bears a substantial relationship to this "peculiar source of evil" because it addresses, in mild terms, the additional expense wrought by the new residents.

In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, the Court held that a New York state limit on civil service veterans' preference to only those veterans who were residents of the state when they entered military service is unconstitutional. The case generated several opinions. Only four justices (Brennan, Marshall, Blackmun, and Powell) held that the right to travel was violated. The penalty analysis in *Soto-Lopez* concentrated on the fact that the immigrant veterans were *permanently* barred from receiving civil service bonus points. *Id.* at 909. The plurality opinion found a "guiding principle" to tie together the various analyses described above: the right to migrate protects residents of a state from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents. *Id.* at 904. That said, however, the plurality promptly "inferred" a penalty on interstate migration in *Zobel* and *Hooper* and returned to strict scrutiny review. *Id.* at 908. Justice O'Connor, in dissent, strongly chastised this maneuver, noting that "the plurality simply rejects the equal protection approach the Court has previously employed in similar cases [*e.g.*, *Hooper*], without bothering to explain why its novel use of both 'right to migrate' analysis and

strict equal protection scrutiny is more appropriate, necessary or doctrinally coherent." *Id.* at 919 (citations omitted) (O'Connor, J., dissenting). Note also, that this case elevates public employment to the same level as the "necessities of life" analyzed in *Shapiro* and *Memorial Hospital*. Chief Justice Burger, who provided the fifth vote in *Soto-Lopez*, would not have reached the right to travel issue at all because the case could have been resolved on straight equal protection grounds. *Id.* at 912-13 (Burger, C.J., concurring in the judgment). Thus, strict scrutiny for right to travel issues has not been accepted by a majority of this Court since *Memorial Hospital* in 1974. In *Soto-Lopez*, Justice O'Connor's dissent (joined by Justices Rehnquist and Stevens) was based on her analysis of the Privileges and Immunities Clause. *Id.* at 920 (O'Connor, J., dissenting). Finding any impact on the right to travel to be "ephemeral," Justice O'Connor used only the rational basis standard, which the law withstood. *Id.* at 923-24 (O'Connor, J., dissenting).

II

WELFARE BENEFITS CASES DECIDED IN THE SAME TIME PERIOD AS SHAPIRO UNDERCUT SHAPIRO'S ABSOLUTIST ANALYSIS

Citizens have no constitutional right to welfare benefits. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973). Thus, it is instructive to overlay the cases in which welfare benefits are constitutionally denied, in whole or in part, with the cases that purport to straightjacket the way states distribute welfare benefits among their populations.

Dandridge v. Williams, 397 U.S. 471, upheld a Maryland regulation which resulted in some disparity in payments to the largest Aid to Families with Dependent

Children (AFDC) families against a challenge that the regulation violated the Equal Protection Clause. The Court established the following test:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." ... "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Id. at 485 (citations omitted). The Court recognized that public assistance programs may give rise to inequalities in their design and administration and nonetheless ruled: "But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination." *Id.* at 486-87 (citations omitted).

The Court explicitly stated that it was not ruling that the Maryland policy before it was wise or best fulfilled the relevant social and economic objectives that the state might ideally espouse, nor that it was the most humane and just system that could be devised.

> But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487 (citations omitted). *Memorial Hospital*, 415 U.S. at 262 n.21, distinguishes *Dandridge* on the basis that the classification in *Dandridge* did not impinge upon a fundamental right. *See Graham v. Richardson*, 403 U.S. 365, 376 (1971). Yet, in *Memorial Hospital*, Justice Rehnquist pointed out the unintended consequences which could result from the Court's opinion--consequences which are just as likely in the case now before this Court:

> Given a finite amount of resources, Arizona after today's decision may well conclude that its indigency threshold should be elevated since its counties must provide for out-of-state migrants as well as for residents of longer standing. These more stringent need requirements would then deny care to additional persons who until now would have qualified for aid.

Memorial Hospital, 415 U.S. at 279 (Rehnquist, J., dissenting). Thus, on the one hand, the Court says it will resist the temptation to become a super-legislature and allow the states to make the public assistance decisions; while on the other hand, the *Shapiro* line of cases severely curtails the

options available to the states. *Id.* at 287 (Rehnquist, J., dissenting).

In *Jefferson v. Hackney*, 406 U.S. 535, the Court upheld the Texas policy of providing a lower percentage of welfare benefits to families with dependent children than was provided to adult recipients, which was attacked as violating the Equal Protection Clause. Applying traditional rational basis analysis, the Court held that the disparities were neither irrational nor invidious. *Id.* at 547.

> A legislature may address a problem "one step at a time," or even "select one phase of one field and apply a remedy there, neglecting the others." ... [T]he legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

Id. at 546-47 (citation omitted). This Court in *Jefferson* specifically addressed the question of providing a lower percentage of payment to certain classes of recipients.

> Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly ....

> Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.

Id. at 548-49. By analogy, it is not irrational to believe that new residents are not disadvantaged by receiving the same amount of AFDC benefits as they would have received in their original state of residence (as well as additional California benefits that may or may not have had counterparts in the original state). The statute at issue in this case does not place immigrants to California in the position the Court believed they possibly faced in *Shapiro*—either stay where they were or starve. This statute maintains the level of benefits the recipients received at their former residence and also places no restrictions on receipt of non-AFDC benefits.

III

FAILURE TO HALT THE EXPANSIVE SHAPIRO DOCTRINE LEADS TO THE CREATION OF EVER MORE FUNDAMENTAL RIGHTS

As demonstrated by the case summaries above, the right to travel is a slippery slope. The doctrine encompasses more and more state activity until it so firmly ties the hands of the states that they are incapable of performing even the most fundamental budgetary functions.

The formulation of the right to travel doctrine which forbids any restriction on a "necessity of life" has already been stretched well beyond the basics. *Memorial Hospital* began this trend with its announcement that *nonemergency* medical care was a necessity of life; *Soto-Lopez* relaxed the "necessity of life" requirement for strict scrutiny to any "very important" benefit or right. *Soto-Lopez*, 476 U.S.

at 907 (civil service examination bonus points). *See Hassan v. East Hampton*, 500 F. Supp. 1034, 1041 (E.D.N.Y. 1980) (applying strict scrutiny to a one year waiting period to obtain commercial shellfish license applicable to only a portion of the available shellfishing lands: "the ordinance burdens a critical aspect of plaintiff's existence, his right to pursue his livelihood; a right that is as much 'a basic necessity of life' as welfare assistance, non-emergency medical care and voting were found to be in earlier Supreme Court decision").

Moreover, certain courts are no longer content to leave the right to travel in the context of interstate travel; now some courts (and commentators) argue that *Shapiro* requires application of strict scrutiny to *any* statute which may impede movement of any kind within a state. *See, e.g., Lutz v. City of New York*, 899 F.2d 255 (3d Cir. 1990) (cruising ordinance struck down); Porter, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820, 821 (1992) (arguing that fundamental right to interstate travel has as a necessary corollary the right to intrastate travel). As Justice Harlan warned in *Shapiro*, the creation of fundamental rights protected by the almost certain result of strict scrutiny analysis to any statute which may impact those rights, set the Court down a road which has become more expansive and well-traveled. The nondrastic, temporary measure at issue in this case should *not* be subsumed into the amorphous (and expanding) right to travel.

IV

THE SOSNA BALANCING TEST PROVIDES A FAIR MEANS OF PROTECTING THE RIGHT TO TRAVEL WHILE PERMITTING STATES SUFFICIENT LEEWAY TO ACCOMPLISH NECESSARY GOALS

Amicus respectfully suggests the use of the *Sosna* balancing test to determine the constitutionality of durational residency requirements. Applying the four factors set forth *supra*, the California statute must be upheld. First, public assistance in the form of AFDC payments certainly carries some importance. Given the place of this assistance in California's entire welfare scheme, however, the temporary, partial reduction of a single public assistance benefit is not of paramount importance. New residents are still entitled to a Special Needs Allowance for homeless assistance, to full Medi-Cal benefits, and an *increase* in Food Stamps. Genest Decl. at A26, ¶¶ 5-6. Moreover, California has *expanded* AFDC eligibility to include those who work 100 hours or more per month. *Id.* at ¶ 4. The constitutional stature of the benefit itself is not in doubt: there is no constitutional right to public assistance. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

Second, the actual likelihood of deterring interstate travel is close to nil. The lower court ducked this issue by noting that "lack of evidence in the record of actual deterrence is of no significance." *Green*, 811 F. Supp. at 521 n.12. Given that the new residents will receive the same amount of AFDC as they received in their former home, in addition to numerous other welfare benefits, *and* given that the petitioners in this lawsuit were obviously not deterred, travel to California is unlikely to be deterred.

Third, the legislative intent of the statute is a matter of some dispute. The lower court refers to a floor debate in which one of the sponsors of the legislation said the statute would protect the state's funds by eliminating an incentive for people to move to California. *Green*, 811 F. Supp. at 522 n.14.[4] Such selective reference to floor debates is a notoriously poor indicator of legislative intent. *See Conroy v. Aniskoff*, 507 U.S. ___, 123 L. Ed. 2d 229, 238 (1993) (Scalia, J., concurring). The court could have just as plausibly focused on the legislator's prefatory statement that the statute was needed, given the realization "that in fact funds are short in California today." *Green*, 811 F. Supp. at 522 n.14. Such an emphasis would coincide with the declarations filed by the State supporting that interpretation. Hordyk Decl. at A21-22; Healy Decl. at A23, ¶¶ 2-3, ¶¶ 7-8.

Fourth, the governmental interests fostered by the law include controlling state expenditures to comply with the state constitutional balanced budget requirement, encouraging early entry into the workforce, and providing basic public assistance to as many individuals as possible. These are certainly laudatory goals entitled to great weight. In any case, they must outweigh the minimal intrusion on the right to travel occasioned by the California statute.

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[4] The constitutional right to travel has never been interpreted to require states to *induce* migration.

V

RULES OF STARE DECISIS AND PRECEDENT DO NOT PREVENT THE SUBSTANTIAL NARROWING OR OVERRULING OF THE SHAPIRO LINE OF CASES

This Court has always acknowledged a power in constitutional questions--great or small--to revisit its past decisions, and modify or abandon them altogether. *See Brown v. Board of Education*, 347 U.S. 483 (1954), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1896); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Cf. Graves v. People of the State of New York*, 306 U.S. 466, 491-92 (1938) (Frankfurter, J., concurring) (stating that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it").

Stare decisis is not authoritative when the precedent has proven "'unsound in principle and unworkable in practice.'" *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989). The Court "has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring). Moreover, the effect of stare decisis is limited in closely divided cases, or in cases in which there were vigorous dissenting opinions. *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991) (noting prior precedent could be overruled because they "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions").

In this case, reliance on *Shapiro* and *Memorial Hospital* is unwarranted. These cases temporarily elevated strict scrutiny equal protection analysis to the right to travel despite the lack of the "right to travel's" moorings in the Constitution. This Court has not actually followed the reasoning of these cases since 1974, yet obviously some lower courts, including the court below, still feel constrained by them. The *Shapiro* court itself noted that its decision bucked literally centuries of English and American tradition. *Shapiro*, 394 U.S. at 628 n.7 (noting that waiting period requirements date back at least to the English Law of Settlement and Removal of 1662). Moreover, Congress and 46 state legislatures had chosen to implement residency requirements for receipt of public assistance. *Shapiro*, 394 U.S. at 676 (Harlan, J., dissenting). The tremendous impact of the *Shapiro* line of cases in terms of the number of statutes it invalidated is still being felt today. California--as well as other states--have made a good faith effort to comply with the stringent demands of *Shapiro*. Such total compliance may not be possible; however, given the language of this Court's opinions since *Shapiro*, such total compliance is not necessary.

Some courts already find *Shapiro* unpersuasive. In *Jones v. Milwaukee County*, 168 Wis. 2d 892, 485 N.W.2d 21 (1992), the Wisconsin Supreme Court upheld a state statute which required 60 days residence to be eligible for general relief. The court addressed *Shapiro* and *Memorial Hospital's* "penalty" analysis, but held that 60 days without welfare is substantially less onerous than a one year depriyation; the minimal deprivation did not amount to a penalty on right to travel. *Id.* at 25-26. The court focused on numerous state interests. The court found legitimate interests, *inter alia*, in preserving the public fisc, conserving scarce taxpayer funds in upholding the law, and not encouraging "'those who would precipitously alter their

situation in life without giving any thought to whether there is any reasonable prospect that they will be able to support themselves.'" *Id.* at 26. The *Jones* court relied in part in *Dandridge v. Williams*, 397 U.S. 471, which established welfare eligibility requirements that did not penalize the right to travel. *See supra* at 12-16. One might inquire whether the *total* loss of two months welfare in Wisconsin (which has generous benefits) is equivalent to a *partial* loss spread over 12 months in California (which also has generous benefits)? This case gives this Court the opportunity to choose one of the many tests applied to right to travel issues, and assert its primacy over the others. Amicus respectfully suggests the balancing test as the most fair means of determining the interests and rights of both the state and new residents.

CONCLUSION

Because the application of absolutist strict scrutiny to right to travel issues is grounded neither in the Constitution nor by a majority of this Court since 1974, the *Shapiro* and *Memorial Hospital* cases should not control the outcome of a temporary, partial reduction in welfare benefits. For the reasons described above, the Ninth Circuit erroneously struck

down the California temporary residency requirements unconstitutional and should be reversed.

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Respectfully submitted,

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